

Advisory Opinion 2020-03

Issued on February 6, 2020, by

The West Virginia Ethics Commission

Opinion Sought

An appointed member of a **State Appeals Board** asks whether he may serve as a member of a state Political Party Executive Committee.

Facts Relied Upon by the Commission

The Requester has been serving as one of the Governor's appointees to a state Appeals Board. The Appeals Board is governed by a state statute¹, which provides, in part, "No member of the [Appeals Board] ... may hold any other office, or accept any appointment or public trust, nor may he or she become a candidate for any elective public office or nomination thereto...." The statute prescribes other eligibility requirements and requires members of the Board to be paid an annual salary.

The Requester is also the former Chairperson of a state political executive committee ("Executive Committee"). Executive Committees are governed by W. Va. Code § 3-1-9. The Requester asserts that an at-large member who was a former Chairperson of the Executive Committee is resigning soon. This may result, by operation of this statute and/or the Executive Committee's by-laws, in the Requester being re-appointed to the Executive Committee.

The Requester asks whether the Ethics Act or the statute governing the Appeals Board prohibits him from serving on the Executive Committee while maintaining his state position as a member of the Appeals Board.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5 states, in relevant part:

- (a) The provisions of this section apply to all public officials and public employees, whether full or part-time and whether compensated or not, in state, county, municipal governments and their respective boards, agencies, departments, and commissions and in any other regional or local governmental agency, including county school boards.

¹ The citation to the West Virginia Code section has been intentionally omitted to preserve the confidentiality of the identity of the Requester in accordance with W. Va. Code § 6B-2-3(a).

(b) (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-1-3, states, in relevant part:

(j) “Public employee” means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

(k) “Public official” means any person who is elected to, appointed to, or given the authority to act in any state, county, or municipal office or position, whether compensated or not, and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating, or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or interests of any person. The term “public official” includes a public servant volunteer.

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The Ethics Act applies to “public officials” and “public employees,” as defined in W. Va. Code § 6B-1-3 (j) and (k). The Commission has previously held that members of state or county executive committees are not public officials for purposes of the Ethics Act. In Advisory Opinion 1990-12, the Commission, relying upon *State v. Bivens*, 149 S.E. 2d 284 (W. Va. 1966), stated, “Although an executive committee of a political party is created and the election and conduct of its members are regulated by statute ..., a member of such committee is not ... a public officer.”

The Ethics Commission reaffirms that a Political Party Executive Committee member is not subject to the provisions of the Ethics Act.

The Requester, as an appointed member of the Appeals Board, is, however, a public official for purposes of the Ethics Act. W. Va. Code § 6B-2-5(a). Therefore, the issue before the Commission is whether the Ethics Act prohibits a member of the state Appeals Board from serving on a state Executive Committee, a nonpublic office.

While the Commission has not previously answered this question, it has held that the Ethics Act does not prohibit a state official or employee from holding a public office. Most recently, in Advisory Opinion 2019-18, the Commission held that “[i]n general, the Ethics Act contains no provision which prohibits State employees from seeking an elected public office.” And, in Advisory Opinion 2017-22, the Commission stated that it has no authority to make the determination of whether a member of a state board was eligible to serve on another public board. Likewise, here, there is no provision of the Act that prohibits a state official or employee from serving as a member of a Political Party Executive Committee.

The Ethics Commission holds that the Ethics Act does not prohibit a state official or employee from serving as a member of a Political Party Executive Committee.

While the Requester may simultaneously hold both positions, the Requester may not use the resources of the Appeals Board to perform the functions of his state Executive Committee position. W. Va. Code § 6B-2-5(b).

While nothing in the Ethics Act prohibits a public official from serving as a member of a Political Party Executive Committee, the Commission has no jurisdiction to rule whether other laws or policies prohibit it. Advisory Opinion 2019-18.

The Ethics Commission holds that it has no jurisdiction to interpret the statute governing the state Appeals Board or to rule whether it or other laws prohibits the Requester’s service on the state Political Party Executive Committee.

The Requester should ensure that no personnel policies of the agency, state laws or federal laws restrict his political activities.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11 and does not purport to interpret other laws or rules.

In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission